

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

TIMOTHY L. OGDEN and )  
CLARISSA M. OGDEN, )

Plaintiffs, )

No. 03:11-CV-00650-HU

v. )

ROBERT WARREN TRUCKING, LLC, )  
and RICHARD WARREN, aka DICK )  
WARREN, )

Defendants. )

**MEMORANDUM OPINION AND ORDER  
ON MOTION FOR  
SUMMARY JUDGMENT**

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1 HUBEL, Magistrate Judge:

2 The plaintiffs Timothy L. and Clarissa M. Ogden bring this  
3 action to recover unpaid wages and damages from their former  
4 employer Robert Warren Trucking, LLC ("RWT"), and Richard Warren  
5 ("Warren"), individually. The case is before the court on the  
6 defendants' Motion for Summary Judgment.<sup>1</sup> The motion is fully  
7 briefed, and the court heard oral argument on the motion on  
8 July 24, 2012.

9 **BACKGROUND FACTS**

10 RWT is a trucking company with a fleet of approximately twenty  
11 dump trucks, located in Cloverdale, Tillamook County, Oregon.  
12 RWT's primary business is transporting rock, sand, and topsoil.  
13 Warren holds a controlling ownership interest in RWT, and acts as  
14 the company's chief operating officer, chief executive officer, and  
15 manager, controlling all of the day-to-day operations of the  
16 company. Warren has ultimate decision-making authority for RWT,  
17 and his responsibilities include hiring and firing employees, as  
18 well as the determination of all policies relating to employee  
19 wages and hours.<sup>2</sup>

20 Timothy and Clarissa Ogden were hired by RWT as truck drivers  
21 on or about August 4, 2010.<sup>3</sup> As part of their jobs as truck  
22 drivers, the Ogdens performed "pre-trip" inspections of their  
23 trucks on a daily basis. They drove the trucks between RWT's place  
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25 <sup>1</sup>Dkt. #26.

26 <sup>2</sup>Dkt. #19, First Amended Complaint, ¶¶ 6, 7 & 8; Dkt. #21,  
27 Answer to First Amended Complaint, ¶¶ 6, 7 & 8.

28 <sup>3</sup>Dkt. #19, ¶¶ 9 & 11; Dkt. #21, ¶¶ 9 & 11.

of business and various job sites. The Ogdens contend that RWT did not pay them (or any of its truck drivers) for the time spent on the pre-trip inspections, or the drive time between RWT's business location and the job sites. The Ogdens claim these policies violate "the minimum wage and overtime provisions of both the Fair Labor Standards Act (FLSA) and state wage-and-hour laws."<sup>4</sup> The Ogdens argue RWT's policies result in employees working more than forty hours a week without compensation for overtime.<sup>5</sup>

On October 19, 2010, Mrs. Ogden called Warren at 3:33 p.m., and left a voice mail message indicating she had some concerns about the wage payment policies.<sup>6</sup> Warren returned the call at 4:58 p.m. the same day, and talked with Mr. Ogden.<sup>7</sup> The conversation lasted four minutes.<sup>8</sup> According to Mr. Ogden, he told Warren he wanted to talk "about this prevailing wage" for certain types of jobs, and Warren responded that he did not "have to pay that."<sup>9</sup> Mr. Ogden claims Warren stated he was exempt from payment of any

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<sup>4</sup>Dkt. #19, ¶¶ 13, 14, & 15.

<sup>5</sup>Dkt. #19, ¶ 15. "The FLSA mandates that employees who work in excess of forty hours in a week receive overtime compensation at a rate not less than one and one-half times their regular hourly wage." *Childers v. City of Eugene*, 922 F. Supp. 403, 404-05 (D. Or. 1996) (Coffin, M.J.) (citing 29 U.S.C. § 207(a)(1)).

<sup>6</sup>Dkt. #28, Affidavit of David M. Briggs ("Briggs Aff."), Ex. B - excerpts from the Deposition of Clarissa M. Ogden ("C. Ogden Depo."), p. 40.

<sup>7</sup>Dkt. #28, Briggs Aff., Ex. A - excerpts from the Deposition of Timothy L. Ogden ("T. Ogden Depo."), p. 75.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*, p. 76.

1 prevailing wage. Mr. Ogden told Warren he had spoken with "BOLI"  
 2 (the Oregon Bureau of Labor and Industry) about the matter, which  
 3 caused Warren to become agitated and go "off the handle."<sup>10</sup>  
 4 According to the Ogdens, both of whom were listening to the call on  
 5 a speaker phone, Warren stated, "You know what, you're done, you're  
 6 through."<sup>11</sup> Mr. Ogden asked for clarification a couple of times as  
 7 to whether Warren was firing the Ogdens, and Warren continued to  
 8 state either, "You're through," or "You're done."<sup>12</sup> Mr. Ogden then  
 9 hung up the phone.<sup>13</sup> About a minute later, Warren tried to call the  
 10 Ogdens back, but they did not answer the phone. He tried again,  
 11 and this time left a voice mail message. The parties have an audio  
 12 recording of the voice mail message, so its contents are not in  
 13 dispute. Warren stated:

14           Hey, you hung up too quick. I didn't fire  
 15           you. You're done taking my trucks to the job.  
 16           I'll arrange to get them there. And Ann just  
 17           pulled your tickets, you have been paid, we  
               got them right here, your time tickets. Thank  
               you, bye.<sup>14</sup>

18           Warren called the Ogdens again the next morning, but they  
 19 again did not answer the phone. Warren left another voice mail  
 20 message, of which an audio recording also exists, stating:

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22           <sup>10</sup>*Id.*, pp. 76-77.

23           <sup>11</sup>*Id.*, p. 77.

24           <sup>12</sup>*Id.*, pp. 77-78; Dkt. #40-1, Ex. A to Declaration of John H.  
 25 Weiner, excerpts from C. Ogden's Deposition ("C. Ogden Depo-Weiner  
 Decl."), pp. 52-53

26           <sup>13</sup>T. Ogden Depo., p. 78.

27           <sup>14</sup>Dkt. #26, p. 4; see T. Ogden Depo., p. 92; C. Ogden Depo.,  
 28 p. 58.

1 Hey Tim, this is Dick. I wanted to apologize  
 2 for yesterday. When you mention BOLI, I get  
 3 pissed. Anyway, why don't you come over  
 4 tomorrow and we'll talk this out. We can pull  
 5 all the rules and regulations and I'll have  
 6 the computer for you so you can see all of  
 7 them. And you do get paid from the time you  
 8 leave the shop. You're on your own to  
 9 Tillamook and Lincoln City as far as turning  
 your tickets in. I don't make out your  
 tickets for you. Everybody has to make out  
 their own, I don't even want to. But, you get  
 all your travel time, you have to turn them  
 in, that's what I told Clarissa the other day.  
 I think there's some other guys that are mixed  
 up on that, too. But, give me a call or come  
 on over, bye.<sup>15</sup>

10 Mr. Ogden called Warren that afternoon, stating he would not  
 11 be coming into the office to talk with Warren. Mr. Ogden told  
 12 Warren, "I'm not coming in to talk to you. I don't feel safe about  
 13 it."<sup>16</sup>

14 The Ogdens believed Warren had fired them. Their explanation  
 15 for his quick call-back, and statement that they had hung up too  
 16 soon and actually were not fired, is that Warren (or his wife) had  
 17 realized firing the Ogdens for complaining about the wage policies  
 18 was impermissible, and Warren was attempting to retract his  
 19 statement in order to stay out of trouble.

20 The Ogdens sent RWT a handwritten letter dated October 20,  
 21 2010, that was received by RWT on October 25, 2010, regarding "Hour  
 22 and wage dispute and notice of unpaid wages."<sup>17</sup> In the letter, the  
 23 Ogdens claimed RWT owed them: (a) unpaid wages for all  
 24 uncompensated time between the time they clocked in each day until

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 26 <sup>15</sup>Dkt. #26, p. 4; T. Ogden Depo., pp. 105-06.

27 <sup>16</sup>T. Ogden Depo., p. 118.

28 <sup>17</sup>Dkt. #27, Affidavit of Richard Warren ("Warren Aff.", Ex. A.

1 they clocked out, including each day's fifteen-minute pre-trip  
 2 inspection of the truck, and the time spent driving back and forth  
 3 between "the yard" and job sites; (b) "all wages due for public  
 4 works projects, and federally funded projects at the legal rate set  
 5 by statute [sic] for said projects"; and (c) overtime wages for all  
 6 hours worked in excess of eight hours per day.<sup>18</sup>

7 On October 28, 2010, Warren sent Mr. Ogden a check for  
 8 \$411.60, and Mrs. Ogden a check for \$273.00, representing the  
 9 amounts Warren estimated to be due for the Ogdens' pre-trip  
 10 inspections and travel time. The Ogdens received the checks a day  
 11 or two later.<sup>19</sup>

#### 12 **THE PLAINTIFFS' CLAIMS**

13 In their First Claim, asserted against RWT and Warren, the  
 14 Ogdens contend Warren discharged them from their jobs at RWT in  
 15 retaliation for their complaints about the company's wage policies,  
 16 in violation of the anti-retaliation provision of the federal Fair  
 17 Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3).<sup>20</sup> An employer  
 18 who violates the anti-retaliation provision of the FLSA is "liable  
 19 for such legal or equitable relief as may be appropriate to  
 20 effectuate the purposes of section 215(a)(3) of this title,  
 21 including without limitation employment, reinstatement, promotion,  
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23 <sup>18</sup>*Id.*; Dkt. #19, ¶ 16; Dkt. #21, ¶ 15.

24 <sup>19</sup>Dkt. #27, Warren Aff., ¶¶ 6 & 7; T. Ogden Depo. p. 134.

25 <sup>20</sup>"[I]t shall be unlawful for any person . . . (3) to discharge  
 26 or in any other manner discriminate against any employee because  
 27 such employee has filed any complaint or instituted or caused to be  
 28 instituted any proceeding under or related to this chapter. . . ."  
 29 U.S.C. § 215(a)(3).

1 and the payment of wages lost and an additional equal amount as  
 2 liquidated damages." 29 U.S.C. § 216(b). In addition, a  
 3 prevailing plaintiff in such an action is entitled to "a reasonable  
 4 attorney's fee to be paid by the defendant, and costs of the  
 5 action." *Id.* On this claim, the Ogdens seek "Lost wages and  
 6 liquidated damages in an amount to be determined at the time of  
 7 trial, and such other legal and equitable relief as this Court  
 8 deems appropriate, in addition to reasonable attorney fees and  
 9 costs. . . ." <sup>21</sup>

10 In their Second Claim, asserted against RWT, the Ogdens  
 11 contend RWT failed to make timely payment to them of wages that  
 12 were due at the time their employment was terminated, in violation  
 13 of ORS § 652.140<sup>22</sup>. The Ogdens contend, therefore, that they are  
 14 entitled to nine days of penalty wages under ORS § 652.150<sup>23</sup>, as  
 15 well as attorney fees and costs.<sup>24</sup>

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 17 <sup>21</sup>Dkt. #19, Amended Complaint, p. 12, ¶ 1.

18 <sup>22</sup>"When an employer discharges an employee or when employment  
 19 is terminated by mutual agreement, all wages earned and unpaid at  
 20 the time of the discharge or termination become due and payable not  
 21 later than the end of the first business day after the discharge or  
 22 termination." ORS § 652.140(1).

23 <sup>23</sup>For willful failure to pay termination wages when due, ORS  
 24 § 652.150 provides for a penalty equal to the employee's regular  
 25 hourly rate for eight hours per day until paid, for a maximum of  
 26 thirty days. However, for employees who are required to submit  
 27 regular time records to the employer, the penalty may be avoided if  
 28 the employer pays "the wages the employer estimates are due and  
 payable . . . and the estimated amount of wages paid is less than  
 the actual amount of earned and unpaid wages, as long as the  
 employer pays the employee all wages earned and unpaid within five  
 days after the employee submits the time records." ORS  
 § 652.150(1). See Dkt. #34, p. 20.

<sup>24</sup>Dkt. #19, p. 12, ¶ 2.

1 In their Third Claim, asserted against RWT, the Ogdens claim  
 2 they were discharged in retaliation for their wage complaints in  
 3 violation of ORS § 652.355(1).<sup>25</sup> The Ogdens claim that pursuant to  
 4 ORS § 659A.885<sup>26</sup>, they are "entitled to equitable relief and  
 5 economic damages (including back pay, benefits, and front pay) in  
 6 an amount to be determined at trial along with other compensatory  
 7 damages[,] . . . punitive damages . . . [and] reasonable attorney  
 8 fees[.]"<sup>27</sup>

#### 10 **SUMMARY JUDGMENT STANDARDS**

11 Summary judgment should be granted "if the movant shows that  
 12 there is no genuine dispute as to any material fact and the movant  
 13 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
 14 56(c)(2). In considering a motion for summary judgment, the court  
 15 "must not weigh the evidence or determine the truth of the matter  
 16 but only determine whether there is a genuine issue for trial."  
 17 *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002)  
 18 (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th  
 19 Cir. 1996)).

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21 <sup>25</sup>"An employer may not discharge or in any other manner  
 22 discriminate against an employee because . . . [t]he employee has  
 23 made a wage claim or discussed, inquired about or consulted an  
 attorney or agency about a wage claim. . . ." ORS § 652.355(1)(a).

24 <sup>26</sup>In a civil action for unlawful discrimination, "the court may  
 25 order injunctive relief and any other equitable relief that may be  
 26 appropriate, including but not limited to reinstatement or the  
 hiring of employees with or without back pay, . . . costs and  
 27 reasonable attorney fees at trial and on appeal[.]" ORS  
 659A.885(1).

28 <sup>27</sup>Dkt. #19, Amended Complaint, ¶¶ 34 & 38; *id.*, p. 12 ¶ 3.



1 The Ninth Circuit Court of Appeals has described "the shifting  
2 burden of proof governing motions for summary judgment" as follows:

3 The moving party initially bears the burden of  
4 proving the absence of a genuine issue of  
5 material fact. *Celotex Corp. v. Catrett*, 477  
6 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d  
7 265 (1986). Where the non-moving party bears  
8 the burden of proof at trial, the moving party  
9 need only prove that there is an absence of  
10 evidence to support the non-moving party's  
11 case. *Id.* at 325, 106 S. Ct. 2548. Where the  
12 moving party meets that burden, the burden  
13 then shifts to the non-moving party to desig-  
14 nate specific facts demonstrating the exis-  
15 tence of genuine issues for trial. *Id.* at  
16 324, 106 S. Ct. 2548. This burden is not a  
17 light one. The non-moving party must show  
18 more than the mere existence of a scintilla of  
19 evidence. *Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed.  
2d 202 (1986). The non-moving party must do  
more than show there is some "metaphysical  
doubt" as to the material facts at issue.  
*Matsushita Elec. Indus. Co., Ltd. v. Zenith  
Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.  
1348, 89 L. Ed. 2d 528 (1986). In fact, the  
non-moving party must come forth with evidence  
from which a jury could reasonably render a  
verdict in the non-moving party's favor.  
*Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In  
determining whether a jury could reasonably  
render a verdict in the non-moving party's  
favor, all justifiable inferences are to be  
drawn in its favor. *Id.* at 255, 106 S. Ct.  
2505.

20 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th  
21 Cir. 2010).

22 Employment discrimination actions require particular scrutiny  
23 at the summary judgment stage. "As a general matter, the plaintiff  
24 in an employment discrimination action need produce very little  
25 evidence in order to overcome an employer's motion for summary  
26 judgment." *Chuang v. Univ. of Calif. Davis, Bd. of Trustees*, 225  
27 F.3d 1115, 1124 (9th Cir. 2000). This minimal evidence standard is  
28 due to the nature of employment cases, where "the ultimate

1 question is one that can only be resolved through a searching  
 2 inquiry - one that is most appropriately conducted by a factfinder,  
 3 upon a full record.'" *Id.* (quoting *Schnidrig v. Columbia Mach.,*  
 4 *Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

### 6 **DISCUSSION**

7 The threshold question underlying all of the Ogdens' claims is  
 8 whether or not they were discharged on October 19, 2010. The  
 9 defendants acknowledge that it is unlawful for an employer to  
 10 retaliate against an employee for complaining about nonpayment of  
 11 wages for all hours worked.<sup>28</sup> However, the defendants argue the  
 12 Ogdens were not actually discharged, because "to the extent  
 13 Mr. Warren stated that the Ogdens were terminated in his brief  
 14 phone call on the afternoon of October 19, 2010, he promptly  
 15 retracted the termination decision minutes later and communicated  
 16 this decision in his voice mail message."<sup>29</sup> The defendants assert  
 17 the Ogdens acknowledged, in their depositions, that "to the extent  
 18 they may have been fired in the first phone conversation, that  
 19 decision was immediately retracted."<sup>30</sup> The defendants argue there  
 20 is no genuine issue of fact here, and they are entitled to judgment  
 21 as a matter of law.<sup>31</sup>

22 The Ogdens argue they were, in fact, discharged, and they were  
 23 not obligated to accept Warren's retraction and reinstatement

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24 <sup>28</sup>Dkt. #26, p. 10.

25 <sup>29</sup>*Id.*, p. 8.

26 <sup>30</sup>*Id.*, p. 11.

27 <sup>31</sup>*Id.*, pp. 10-13.

1 offer. They note Warren raised his voice and became angry during  
2 the conversation in which he terminated them, causing Mr. Ogden to  
3 be concerned that if he returned to RWT's offices, a physical  
4 altercation might ensue, or he might even "end up in jail . . .  
5 since he was in Mr. Warren's hometown, [and] Mr. Warren grew up  
6 with local police officers[.]"<sup>32</sup>

7 In reply, the defendants urge the court to consider the  
8 reasonableness of the Ogdens' belief that they had been fired.  
9 They argue the initial conversation and Warren's subsequent voice  
10 mail are not "two separate and distinct events," as characterized  
11 by the Ogdens, but instead they should be viewed as a continuum.  
12 They assert the content of Warren's voice mail message, beginning  
13 with, "Hey, you hung up too quick," indicates he did not believe  
14 the conversation was over at the time Mr. Ogden hung up the phone.  
15 The defendants maintain, "[I]t is up to the court to evaluate what  
16 the words meant."<sup>33</sup> The defendants also allege the Ogdens "were  
17 looking to be terminated,"<sup>34</sup> evidenced by their quick trip to the  
18 unemployment office to seek unemployment benefits.

19 The plaintiffs and the defendants all rely, to some extent, on  
20 the holding in *NLRB v. Cement Masons Local No. 555*, 225 F.2d 168  
21 (9th Cir. 1955), in which the court considered, in the context of  
22 the National Labor Relations Act, whether a union worker was  
23 "actually discharged" when he was taken off of a job for a period  
24 of time. The parties in the present case point to the *NLRB* court's

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26 <sup>32</sup>Dkt. #34, p. 11.

27 <sup>33</sup>Dkt. #43, pp. 2-3.

28 <sup>34</sup>*Id.*, p. 3.

1 holding that "[n]o set words are necessary to constitute a  
2 discharge; words or conduct, which would logically lead an employee  
3 to believe his tenure had been terminated, are in themselves  
4 sufficient." *NLRB*, 225 F.2d at 172 (citing, in a footnote, federal  
5 cases from the 8th and 10th Circuits, and state court cases from  
6 Iowa, Minnesota, California, and Pennsylvania).

7 The defendants in the present case assert that this standard  
8 is consistent with their position, arguing it was not reasonable  
9 for the Ogdens to conclude they had been discharged. The Ogdens  
10 argue their belief was reasonable, based on the content of their  
11 first conversation with Warren. Mr. Ogden asked Warren three times  
12 if the Ogdens were fired, and Warren repeatedly stated they were  
13 either "through" or "done." The Ogdens assert they "were not  
14 required to hear a fourth time, a tenth time, or a twenty-seventh  
15 time that they were 'done' or 'through' before hanging up."<sup>35</sup>

16 The parties appear to agree that resolution of the discharge  
17 question is dependent upon the reasonableness of the Ogdens' belief  
18 that they had been discharged during their first phone conversation  
19 with Warren. Their opposing views regarding whether or not this  
20 belief was reasonable clearly demonstrate the existence of a  
21 genuine issue of material fact that must be resolved at trial.  
22 This type of fact-based determination is particularly inappropriate  
23 at the summary judgment stage, where "'the ultimate question is one  
24 that can only be resolved through a searching inquiry - one that is  
25 most appropriately conducted by a factfinder, upon a full record,'"   
26 with an opportunity to evaluate the witnesses. *Chuang*, 225 F.3d at

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27  
28 <sup>35</sup>Dkt. #34, p. 13.

1 1124 (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410  
2 (9th Cir. 1996)).

3 Notably, following oral argument on the defendants' motion,  
4 they submitted to the court a recording of the two voice mail  
5 messages Warren left for the Ogdens. Although the recordings are  
6 not of the best quality, the court was able to make out most of  
7 what was said and the general tone of voice Warren used during the  
8 messages. Neither Warren's tone nor the content of the messages  
9 changes the court's opinion that summary judgment is inappropriate.

10 Accordingly, the defendants' Motion for Summary Judgment is  
11 **denied** as to the plaintiffs' First and Third Claims.

12 With regard to the Ogdens' Second Claim, summary judgment is  
13 also inappropriate. In this claim, the Ogdens seek penalty wages  
14 for RWT's allegedly tardy payment of wages due them at the time of  
15 their discharge. They note the applicable law requires payment of  
16 wages "not later than the end of the first business day after the  
17 discharge or termination." ORS § 652.140(1). The defendants,  
18 however, argue the Ogdens were not terminated, but instead quit  
19 voluntarily. According to the defendants, all wages the Ogdens  
20 were due through October 18, 2010, had been paid. Once the Ogdens  
21 quit their jobs, payment of any additional wages was not triggered  
22 until the Ogdens submitted additional time records, after which the  
23 wages had to be paid within five days pursuant to ORS  
24 § 652.140(2)(c). The defendants assert the additional wages were,  
25 in fact, paid within five days after RWT received the Ogdens'

1 letter demanding additional wages, and therefore, no penalty wages  
2 are due.<sup>36</sup>

3 As with the Ogdens' First and Third Claims, resolution of this  
4 claim depends on the determination of whether the Ogdens were  
5 discharged, or alternatively, whether they quit voluntarily. The  
6 existence of this issue of fact precludes summary judgment, and the  
7 defendants' motion is **denied** as to the Ogdens' Second Claim.

8  
9 **CONCLUSION**

10 For the reasons discussion above, the defendants' Motion for  
11 Summary Judgment is **denied**.

12 IT IS SO ORDERED.

13 Dated this 25th day of July, 2012.

14 /s/ Dennis J. Hubel

15 \_\_\_\_\_  
16 Dennis James Hubel  
17 Unites States Magistrate Judge  
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28 <sup>36</sup>Dkt. #26, pp. 13-16.